IN THE

Supreme Court of the United States

October Term, 1967

No. 258

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,
Petitioner,

v.

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (Swedish American Line); AMERICAN EXPORT ISBRANDTSEN LINES, INC.; AMERICAN PRESIDENT LINES LTD.; BALTIC STEAMSHIP LINE; CANADIAN PACIFIC RAILWAY COMPANY (Canadian Pacific Steamships); COMPAGNIE GENERALE TRANSATLANTIQUE (French Line); COMPANHIA COLONIAL DE NAVEGACAO (C. C. N.—The Portuguese Line); COMPANIA TRASATLANTICA ESPANOLA, S. A. (Spanish Line); THE CUNARD STEAM-SHIP COMPANY LIMITED; DEN NORSKE AMERIKALINJE A/S, OSLO (Norwegian America Line); DONALDSON LINE LIMITED; EUROPA-CANADA LINIE, G. M. B. H. (Europe-Canada Line); GENERAL STEAM NAVIGATION CO. LTD. OF GREECE, TRANSATLANTIC SHIPPING CORP., TRANSOCEANIC NAVIGATION CORPORATION, ARCADIA STEAMSHIP CORPORATION (Greek Line); GIACOMO COSTA FU ANDREA, GENOA (Costa Line); HAMBURG-ATLANTIK LINIE G. M. B. H. (Hamburg-Atlantic Line); HOME LINES INC. (Home Lines); "ITALIA" SOCIETA PER AZIONI DI NAVIGAZIONE (Italian Line); N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ "HOLLAND-AMERIKA LIJN" (Holland-America Line); NATIONAL HELLENIC AMERICAN LINE S. A. (National Hellenic American Line); NORDDEUTSCHER LLOYD (North German Lloyd); POLISH OCEAN LINES (Gdynia America Line); UNITED STATES LINES COMPANY (United States Line); and ZIM ISRAEL NAVIGATION COMPANY LTD. (Zim Lines), constituting the Member Lines of either or both the TRANSATLANTIC PASSENGER STEAMSHIP CONFERENCE and the ATLANTIC PASSENGER STEAMSHIP CONFERENCE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 19, 1967.*

*Petitioner, as intervenor, participated in all of the proceedings below. The Federal Maritime Commission and United States of America (the "Government"), respondents below, seek certiorari by separate Petition. The issues and facts underlying both Petitions are the same and petitioner adopts and incorporates herein the discussion in the Government's Petition as to "Reasons For Granting The Writ".

OPINIONS BELOW

The first report of the Federal Maritime Commission is reported at 7 F.M.C. 737. The first opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 351 F. 2d 756. The report of the Federal Maritime Commission on remand is not yet officially reported, but may be found at 7 Pike & Fischer S. R. R. 457. The second opinion of the court of appeals is reported at 372 F. 2d 932. Petitioner respectfully refers the Court to the Appendices to the Government's Petition for the reports and orders of the Commission and the opinions and judgment of the court of appeals.

JURISDICTION

The judgment of the court of appeals, reversing and vacating the order entered by the Federal Maritime Commission on remand, was entered on January 19, 1967. The time for filing this Petition was extended to May 19, 1967, and further extended to June 18, 1967, by Orders of this Court dated April 18, 1967, and May 24, 1967; respectively. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 28 U. S. C. 2350.

QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission's disapproval, as contrary to the public interest, of provisions of conference agreements which (a) require unanimous agreement of twenty-five member lines to change the ceiling on commissions paid to travel agents, and (b) prohibit agents from selling passage on non-conference vessels should have been affirmed by the court below on the basis of the Com-

mission's finding that such provisions invade the prohibitions of the antitrust laws more than is necessary to further any valid purpose of the Shipping Act.

2. Whether the court below, in disregard of accepted standards of judicial review, improperly substituted its judgment for that of the Commission which had found such provisions to be detrimental to commerce, contrary to the public interest and unfair or discriminatory as between carriers.

3. Whether the court below should have affirmed the Commission's disapproval of such provisions on an independent legal ground (the existence of interlocking directorates between certain respondents and their major competitors) which the court was competent to formulate.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 46 U. S. C. 814, provides, in pertinent part:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or other-

wise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations."

* * *

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

STATEMENT OF THE CASE

The issue in this case is whether a conference of passenger steamship lines may adopt rules which further no Shipping Act purpose or policy but serve to freeze commissions paid to independent travel agents and restrict representation by them to conference lines only. Specifical-

ly, should the twenty-five members of the conference be permitted to agree (a) never to change the ceiling on commissions paid to agents unless agreement by all of them to such change can be secured and (b) to boycott any agent found to have sold passage on a non-conference vessel?

Petitioner, American Society of Travel Agents, Inc. ("ASTA"), is a trade association whose members are independent travel agents ("agents") in the United States. Among other things, agents advise the public on travel matters and promote and sell various forms of transportation, including air, rail and ocean. Agents make no charge to the public for their services but receive commissions from carriers on consummated bookings. In 1960 agents booked 80% of all transatlantic ocean passage (App. C, 105-06). The transatlantic ocean carriers consider agents to be their "principal sales force" (App. A, 20).

Respondents are the twenty-five transatlantic passenger steamship carriers who are members of either or both the Atlantic Passenger Steamship Conference ("APC") and Trans-Atlantic Passenger Steamship Conference ("TA-PC"). They carry 99% of the transatlantic passenger steamship trade and act collectively with respect to agents through the APC (as to the ceiling on commissions paid to agents) and the TAPC (on all other matters). Each of these conferences has obtained antitrust exemption for such collective action from the Federal Maritime Commission ("Commission") under Section 15 of the Shipping Act, 46 U. S. C. 814.

These proceedings began in 1959 when the Commission, acting on a complaint filed by ASTA in 1958, instituted the first investigation ever held of the operations of the conferences as they affect travel agents (App. C, 78-9). Hearings were held in New York in May and June 1961, at which twenty-six witnesses testified.

In 1964 the Commission ruled that certain conference practices must be modified. Disapproved, as detrimental to commerce, was the APC "unanimity rule" which requires agreement of all twenty-five member lines to change the ceiling on commissions paid to agents. The Commission also disapproved the TAPC "tieing rule" which forbids agents to sell passage on non-conference vessels. Respondents took an appeal to the United States Court of Appeals for the District of Columbia Circuit.

The court below disagreed with the Commission's reasoning on the unanimity rule, finding that of the Examiner more "persuasive" (App. B, 73). The Examiner had recommended that seven respondent lines which provide no service to United States ports be disqualified from voting on commissions, since "* * * compensation paid to agents here is none of their concern." (JA 444a)* Only after reducing the requirement of unanimity of 25 lines to unanimity of the 18 lines which serve United States ports, did the Examiner recommend that the rule be approved. The court below, however, made no reference to this limitation on respondents' voting procedures, noting incorrectly that the "Examiner * * * concluded * * * that the unanimity rule should be approved" (App. B, 70).

The court below also appears to have disagreed with the consideration of antitrust principles applied by both the Commission and the Examiner in disapproving the tieing rule (App. A, 46-7, JA 440a-41a), although the opinion here is ambiguous (App. B, 76-7; see fn. 9). The matter was remanded to the Commission, with directions to make

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*References to the Joint Appendix and Supplemental Joint Appendix which were submitted to the court below appear herein as "JA" and "SJA", respectively. One copy of each has been filed herein by the Government as part of the certified record of proceedings below.

supporting findings which adequately sustain its ultimate findings or to vacate those findings.

In compliance with these directions, the Commission reopened proceedings for briefing and oral argument. Neither the court below nor any party requested that additional evidence be taken. On July 20, 1966, the Commission, with a new member in the majority and the same dissent, issued a second report and order. It disapproved both the unanimity and tieing rules on grounds that they are (a) detrimental to commerce, (b) contrary to the public interest and (c) unfair or discriminatory as between carriers.

The Commission found that a strong majority of respondents had attempted to improve their competitive position by raising the ceiling on agents' commissions but had been blocked by the unanimity rule, so that commissions were frozen at levels lower than those paid by their major competition, the international airlines (App. C, 94-5, 104).* This induced agents to "push" air travel and contributed to a decline in sales of ocean passage (App. C, 104). The Commission concluded that but for the unanimity rule, the majority would have increased agents' commissions and that an increase would have enhanced the competitive position of the steamship lines (App. C, 104).** The decline in respondents' competitive position resulting from the

*In its report on remand the Commission found that the unanimity rule had blocked respondents' efforts to match the airlines' 10% tour commission during the period 1959 through December 1962 (App. C, 82-3); respondents paid agents only 7% for promoting similar tours during this period. This was a new finding, supplementing the Commission's earlier findings of an "effective" disparity in air-sea commissions (even where numerically similar), due to the much greater time involved in selling ocean passage.

**Although the absence of this finding from the first report had been characterized by the court below as "most significant" (App. B, 74), the court made no reference to the new finding in reversing and vacating the Commission's report on remand.

rigidifying effects of the unanimity rule was found to constitute detriment to the water-borne commerce of the United States.

The Commission also found that the decline in ocean travel was contrary to the public interest in the maintenance of a sound and independent merchant marine and that it was unfair and discriminatory as between carriers for a small majority (in some cases one line) to thwart the wishes of the majority to take action with respect to agents' commissions.

To these grounds for disapproval of the unanimity rule, the Commission added, for the first time, a definitive construction of the duties imposed upon it by the "public interest test" incorporated in Section 15 of the Shipping Act in 1961*:

> "The determination to approve or to allow continued approval of an agreement requires, on the one hand, consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws and, on the other, a consideration of the circumstances and conditions existing in the particular trade in question which the anticompetitive agreement seeks to remedy or prevent. * * *
>
> "* * *. The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise * * * it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended, and the agreement is contrary to that

*46 U. S. C. 814.

interest within the meaning of section 15.* * *" (App. C, 89-90)

The Commission found that respondents had made no showing that the unanimity rule fulfilled any Shipping Act purpose, was necessary to their operations or served to benefit the public and concluded that the rule's excessive invasion of antitrust principles is contrary to the public interest, as that term is used in the Act (App. C, 90).

Section 15's public interest test was then applied to the TAPC tieing rule. The Commission found that respondents controlled 99% of the transatlantic passenger steamship business and through enforcement of the rule foreclosed to non-conference vessels services of agents responsible for promoting and selling 80% of such business in the United States (App. C, 85). Since respondents failed to show any Shipping Act purpose in, need for, or benefit from the rule, it was disapproved as unnecessarily anticompetitive and contrary to the public interest (App. C, 106-07).

The Commission made the following additional findings as to the tieing rule's detrimental effects on commerce:

> "* * * It is detrimental to the interest of the agents, one part of our commerce, because it denies them the right to book passengers who desire to travel by nonconference vessels by the means they desire and thus live up to their duty as agents. It is detrimental to the interests of the nonconference carriers, another part of our commerce, because it denies them the use of agents upon whom, they, like the conference lines, must depend for the sale of ocean transportation. Lastly, it is detrimental to the interests of the traveling public, still another part of our commerce, in that it denies prospective

passengers the right to utilize the valuable services of agents in fulfilling their desires to travel on non-conference vessels. * * *" (App. C, 108-09)

Again respondents took an appeal to the Court of Appeals for the District of Columbia Circuit which, on January 19, 1967, in a three page opinion, reversed the Commission's order as "arbitrary, capricious and not supported by substantial evidence."

REASONS FOR GRANTING THE WRIT

I. The Holding Below Precludes The Federal Maritime Commission From Considering Antitrust Policies In Applying The Shipping Act's Public Interest Test, Is Inconsistent With Principles Of Law Established By This Court, Will Cripple Government Agencies In Carrying Out Their Regulatory Functions And Will Adversely Affect Commerce And The Public Interest.

This case presents for the first time the question of the proper construction to be given to the "public interest test" added to Section 15 of the Shipping Act in 1961. The issues directly affect more than 4,000 travel agents in the United States, all transatlantic ocean passenger carriers and the traveling public. Indirectly affected are other regulated industries and government agencies operating under statutes containing similar public interest tests.* This is also the first case presented to this Court dealing with the relationships between travel agents, carriers and regulatory agencies.

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*See, e.g., 49 U. S. C. 1382 (C. A. B.); 49 U. S. C. 5 (I. C. C.); 47 U. S. C. 303, 307, 311 (F. C. C.).

The lower court's summary rejection of the construction given the public interest test by the Commission can only be interpreted as a holding that antitrust principles are not to be considered in determining what is in the public interest. This becomes clear in the light of the two opinions of the court below. In the first, the court said: "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles * * *" (App. B, 76). This language was modified by a footnote which suggested that the Commission should not "completely separate itself from antitrust principles" (*Ibid.*). However, in its second opinion, the court below rejected, without comment, the consideration of anticompetitive effects given the rules in issue.

The Commission's consideration on remand of anticompetitive consequences was called for not only to resolve the ambiguity created by the text and footnote of the first court opinion referred to above, but also to comply with principles established by this Court, which require regulatory agencies to "reconcile" competing statutory schemes (e.g., antitrust and exempting statutes) "* * * rather than holding one completely ousted." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963); see also *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 85-6 (1944). As recently as June 5, 1967, the principle that anticompetitive consequences must be weighed by regulatory agencies was applied to a statutory public interest test in *Denver & Rio Grande Western Railroad Co.* v. *United States*, 35 U. S. L. W. 4531, 4533 (U. S. June 5, 1967):

> "Commonsense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of * * * anticompetitive consequences * * * Both the ICC and this Court have read terms such

> as 'public interest' broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects * * *"

Although this Court has never ruled on whether the Federal Maritime Commission is similarly obligated to evaluate anticompetitive effects in dealing with the Shipping Act's public interest test, it has stated that Congress intended to give the shipping industry only a *limited* antitrust exemption and that the antitrust laws represent "fundamental national economic policy". *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 218 (1966).

In accordance with this fundamental policy and the principles of *Silver* and *McLean,* the Commission set about "* * * to reconcile * * * two statutory schemes embodying somewhat incompatible policies * * *, the desire to preserve open competition with Section 15's exemption from the antitrust laws * * *" (App. C, 87, 89). In doing so, it observed that Congress had questioned whether *any* unanimous voting rule should be permitted and had left this issue to be decided by the Commission (App. C, 93-4; S. Rep. No. 860, 87th Cong., 1st Sess. 15 (1961)). The Senate Committee which referred the matter to the Commission pointed out that most shipping conferences employ no such voting rule (*Ibid.*). Since those conferences take collective action which is binding on all members (although agreed upon by a less-than-unanimous vote), a unanimity rule is clearly not necessary to the Shipping Act purpose of permitting carriers to act collectively.

The Civil Aeronautics Board, operating under a statute containing a "public interest test" similar to that of the Shipping Act, has held with respect to unanimous voting in IATA, the international airline conference:

> "It is further understood that it is not intended that a rate established by a conference agreement thereafter can be changed only by unanimous action. Such a requirement would enable a single carrier to freeze the rate structure, and would create an intolerable situation." *IATA Traffic Conference Resolution,* 6 C. A. B. 639, 645 (1946)*

Agreements having the effect of freezing prices, rates or commissions have long been condemned as *per se* violations of the antitrust laws for, among other things, the same reasons given by the C. A. B. above, in circumscribing IATA's voting procedures. See, *e.g., United States* v. *Trenton Potteries Co.,* 273 U. S. 392 (1927); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948); *United States* v. *Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150 (1940); *United States* v. *National Association of Real Estate Boards,* 339 U. S. 485 (1950).

The impact on commerce of collectively frozen commissions exceeds in many ways that which results from the collective fixing of fares. In the latter case, those primarily affected are traveling to Europe for pleasure, an infrequent event for most people, who, in any event, have the alternative of air travel. By contrast, the entire travel agent industry is dependent in part for its livelihood on commissions paid by respondents. Agents have no countervailing economic power. Forbidden by the antitrust laws to take collective action, they cannot strike. Yet they are regulated by

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*Although the C. A. B. permitted air carriers initially to *try* to establish rates by unanimous voting, it insisted that they should have freedom to act independently if agreement were not achieved (6 C. A. B. at 645): "The right of independent action * * * must be scrupulously preserved * * * an air carrier * * * will be free to initiate its own rates if such consultation has not resulted in agreement * * *." The C. A. B. also insisted that all agreements must provide for "termination within a reasonable period." (*Ibid.*) The APC agreement contains no such limitations.

another industry whose antitrust exemption, according to the court below, is unlimited.

The effects of the misuse of that exemption brought about by the unanimity rule are illustrated by the findings of the Commission on remand. Commissions were found to have been frozen below competitive levels sought by the majority of respondents for at least six years in the case of general commissions and for over two and one-half years in the case of tour commissions (App. C, 98-9). In 1963, they were still below the level advocated by the majority of respondents thirteen years before (*Ibid.*). In at least one instance, a single respondent had blocked APC action (App. C, 98). In effect, the "intolerable situation" precluded by the C. A. B. in the case of respondents' major competitors has been found to exist in the APC. The Commission concluded:

> "Had there been a showing that the rule was required by some serious transportation need, or necessary to secure an important public benefit, or in furtherance of some purpose or policy of the statute, we might have required more before disapproving the rule.[15] But, in view of our responsibilities under section 15, disapproval of the rule is required in order to protect the public interest against an unwarranted invasion of the prohibitions of the antitrust laws, since it has not been shown to be necessary in furtherance of any valid regulatory purpose under the Shipping Act." (App. C, 104-05) (footnote omitted.)

An even more obvious invasion of the prohibitions of the antitrust laws exists in the case of the TAPC tieing rule which operates to bar any agent who sells passage on a non-conference vessel from serving all respondents. The

rule effectively constitutes a group boycott, a *per se* antitrust violation. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941). Moreover, this Court has construed the Shipping Act to prohibit "* * * practices of conferences which have the purpose and effect of stifling the competition of independent carriers. * * *" *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 491 (1958).

Respondents, who operate in the Caribbean without any such rule (App. C, 107), were no more able to show any valid Shipping Act purpose or need for the tieing rule than for the unanimity rule. Absent such evidence, the Commission had no choice, in reconciling the Shipping Act with the antitrust laws, but to disapprove the rule.

The direct effect of the lower court's summary reversal of the Commission is to read antitrust considerations out of the "public interest test" of Section 15 and to give shipping cartels freedom to agree on anticompetitive measures, without regard to whether such agreement is necessary to carry out the purposes of the Shipping Act. By rejecting the standards adopted by the Commission for evaluation of conference practices, the court below has made it virtually impossible for the Commission to carry out the task assigned it by Congress providing "* * * strict administrative surveillance of shipping conferences * * *" (App. C, 88).* If this decision stands, other government agencies operating under statutes containing similar public interest tests could be precluded from applying to industries they are supposed to regulate the antitrust concepts which this Court has found to be fundamental national economic policy.

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*The Ocean Freight Industry, Report of Antitrust Sub-Committee, House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong., 2d Sess. 381 (1962).

The immediate consequences of the lower court's holding are to deny travel agents throughout the United States and the traveling public relief from cartel practices for which no justification has been, or can be, shown. Respondents are free to continue to prohibit agents from selling the public passage on non-conference vessels. They are obliged to establish and maintain commissions payable to agents by voting procedures which prevent them from adjusting to changing economic conditions. Bound to act on all matters by unanimous vote, respondents cannot even change their own procedures without agreement of all lines (App. A, 32). Furthermore, the lower court has in effect endorsed the proposition that each of seven respondent lines which provide *no* service to the United States is nevertheless eligible to veto conference action on matters affecting agents here. Even the Examiner, whose reasoning the court below considered more "persuasive" than that of the Commission, found this proposition unacceptable. In short, the court below has summarily ruled on a matter which has now been in litigation for nine years, the effects of which will be to perpetuate unjustified anticompetitive practices having detrimental consequences to the public interest and the commerce of the United States.

II. The Court Below Disregarded Principles of Judicial Review Established By This Court And Substituted Its Conclusions For The Commission's Findings

This Court has held that judicial review of agency action should be limited to determining whether such action has "* * * warrant in the record and a reasonable basis in law * * *". *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U. S. 357, 367 (1965). In *Consolo* v. *Federal Maritime Commission,* 383 U. S. 607 (1966), warrant in the record was construed as "substantial evidence * * * such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * * enough to justify, if the trial were to a jury, a refusal to direct a verdict * * *" (*Id.* at 619-20). The court below was instructed that it must not substitute its discretion for that of the agency, even if an inconsistent conclusion might be drawn from the same evidence. (*Ibid.*)

In the instant case, however, the court below has substituted its discretion for that of the agency, ignoring *Consolo* which intervened between its first decision in 1965 and its 1967 reversal of the order on remand. The court gave no reasons for reversing the Commission other than: "We are not satisfied that the Commission has made adequate response to our mandate to eliminate the doubts and problems we pointed out in our prior opinion." (App. D, 132) In other words, despite *Consolo* which was directed to the review afforded the same agency by the same court, the latter elected to rely upon a *prior* opinion in which it rejected agency expertise, ignored the substantial evidence test and drew inconsistent conclusions from the evidence.

Two examples of this treatment of the agency report are as follows:

(1) The Commission made findings that the unanimity rule was responsible for a disparity in commissions between air and ocean carriers which caused agents to push air travel and thus provided both the public and the carriers with less than complete and effective service, with detriment to commerce resulting therefrom (App. A, 39-40). In its pre-*Consolo* opinion, the court below rejected these findings, stating: "* * * *we cannot agree* that the unanimity rule prevents complete and effective service by travel agents. * * *" (App. B, 71) (Emphasis added.)

(2) The Commission originally found that there was evidence that the unanimity rule had blocked the

desires of the majority of respondents to raise commissions, putting them at a competitive disadvantage with their major competitors, the international airlines, with resulting detriment to commerce (App. A, 40-1). In its 1965 opinion, the lower court said: "The fact that the wishes of the majority may be blocked * * * even permanently, by the unanimity rule is not *in our view* a sufficient reason under the statute for disapproval * * *." (App. B, 74) (Emphasis added.)

But agreement by the court below with the agency's views is not the test of their adequacy, nor is the fact that the court would have decided the issue differently had it tried the case. For, as this Court said in *Consolo,* "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (383 U. S. at 620).

That there was substantial evidence, sufficient to go to a jury on both points, cannot be denied. As to (1), there was testimony of agents* and of respondents' representatives**, as well as contemporaneous correspondence of respondents***, that showed agents pushed air travel at the expense of ocean passage because the former was substantially more remunerative, and that it was more remunerative because, among other things, the unanimity rule had blocked majority efforts to increase the commission ceiling.† A jury would have been entitled to draw from this evidence the conclusion reached by the Commission that

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*JA 22a-23a, 27a-28a, 29a-30a, 31a, 37a, 38a, 42a, 45a-46a, 62a-65a.

**JA 104a.

***JA 243a-245a, 279a, 289a-290a, 311a, 312a.

†JA 39a, 50a-51a, 77a, 117a-118a, 121a-123a, 131a-132a, 136a-137a, 276a, 278a, 279a, 281a-282a, 285a-286a, 316a, 322a-338a, 339a, 344a-347a; SJA 77a-78a, 80a-81a, 82a, 99a.

the rule was responsible, at least in part, for agents rendering less than complete and effective service to respondents and to the traveling public and was therefore detrimental to commerce.

As to (2), there were admissions by respondents in correspondence of the competitive disadvantage they suffered because of the lower commission ceiling caused by the unanimity rule,* and testimony by their own representatives that the rule had frozen commissions for long periods of time (JA 121a-123a; 136a-137a). Statistical data confirmed that respondents had suffered a competitive disadvantage (JA 371a-374a, 375a, 377a, 378a, 379a). Additionally, the Commission was entitled to draw inferences from what it found to be a "deliberate policy" of respondents to avoid governmental review (App. A, 20; App. C, 98), adopted by them out of fear of the antitrust laws (JA 49a, 61a).** The conclusions drawn by the Commission from this evidence of detriment to commerce may not have been those the court below would have drawn had it tried the matter *ab initio*. The test to be applied, however, was not whether in the view of the court below these conclusions were correct, but whether there was substantial evidence to support them.

The failure of the court below in its post-*Consolo* opinion to address itself to whether the evidence was "substantial" —i.e., sufficient to avoid a directed verdict—on these two

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*JA 243a-245a, 279a, 289a-290a, 311a-312a, 374a-2.

**Cf., *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265 (1946) (a "wrongdoer may not object to * * * [the adequacy of proof] because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."); *United States* v. *Von Clemm*, 136 F. 2d 968, 970 (2d Cir. 1943). Respondents had been warned by the Examiner that if they failed to produce adequate records of votes cast "they lay themselves open to unfavorable inferences then" (JA 4a); more than half of the respondents failed to produce any records of votes cast (See, *e.g.*, SJA 103a-111a).

points is symptomatic of its approach to the case as a whole. At no point did the court below discuss the evidence, not even the evidentiary finding added on remand, absence of which the court had previously deemed "most significant" (App. B, 74) (*i.e.*, "but for" the unanimity rule commissions would have been increased and this "would have enhanced" respondents' "competitive position") (App. C, 104). In effect, the court reversed the Commission because of its disagreement with the conclusions reached by the agency.

The decision below not only does violence to the "substantial evidence" standard of judicial review, but also it negates the expertise of the regulatory agency's "fashioning of discretionary relief", a role this Court deemed "particularly important" in *Consolo* (383 U. S. at 620-21). As in *Consolo,* the Commission here had to take into consideration the many factors peculiar to the shipping industry with which it is familiar and had to fashion discretionary relief in determining how much of the conference agreements to disapprove and in setting forth guidelines for petitioners to follow in modifying those agreements. As in *Consolo,* this case involves "a complex and hard-to-review mix of considerations" (383 U. S. at 621). The Commission could have adopted the decision of the Examiner, disenfranchising the seven lines not serving United States ports and effectively reducing the APC unanimous voting requirement to a three-fourths rule; it could have specified that any modified agreement must contain a majority voting provision; it could have made its disapproval applicable to all APC voting, not merely voting on agents' commissions; and with various permutations it could have fashioned discretionary relief combining these possibilities.

Instead, the Commission chose to exercise its administrative discretion and expertise and disapproved the rules

in issue, without disenfranchising the seven lines referred to above and without specifying the conditions which the modified agreements must meet. This is precisely the kind of administrative decision which must be left to the regulatory agency. The conclusions reached with only brief discussion by the court below must not be allowed to supplant those reached by the Commission through the sound and well-established processes of administrative adjudication of specialized problems.

III. The Court Below Erred In Failing To Affirm The Correct Decision Of The Commission On An Independent Ground It Was Competent To Formulate.

The Commission's decision should have been affirmed by the court below since it was correct on independent grounds the court was competent to formulate. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 88 (1943); *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937); *Chae-Sik Lee* v. *Kennedy,* 294 F. 2d 231, 234 (D. C. Cir.), *cert. denied,* 368 U. S. 926 (1961).

There is undisputed evidence in the record of relationships between respondents and their principal competitors, the international airlines, the existence of which renders the unanimity rule inherently illegal. The voting principals of three of the conference lines (Holland-America, Cunard, Swedish American) are also directors of international airlines (KLM, BOAC, SAS, respectively) engaged in transatlantic passenger service in competition with respondents (JA 128a-29a), and there is, and has been, common ownership between one or more of these pairs of carriers. Each of these major airline competitors, by virtue of the unanimity rule, has the power through its relationship with a respondent to cause, or at least influence, the casting of a veto over APC action on agents' commissions.

"Cooperation" between these purported competitors can be effectuated without discussions, agreements or other indicia of concerted action through a veto vote by a respondent whose greater economic interest may lie in preventing increased competition with the airlines for agents' services. If, for example, any of the voting principals decides that the airline with which he is affiliated wants no change in the maximum ceiling on agents' steamship commissions, there can be no change. The unanimity rule provides the machinery which permits an invisible agreement between a single line and a competitor airline to bind all of the APC lines and, without any overt acts normally associated with conspiracy, prevent respondents from taking action which might increase their ability to compete with the airlines.

The antitrust policy forbidding interlocking directorates in domestic corporations requires no explicit agreement between the supposedly competitive businesses. Clayton Act, § 8, 15 U. S. C. 19.* Rather, it realistically recognizes that the danger inherent in this relationship is one that is tacit and subtle; the *potential threat* to competition, due to conflicting interests, is so intense that the status itself is outlawed, irrespective of any overt conspiracy in restraint of trade. See *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S. D. N. Y. 1953) ("* * * The continued *potential threat* to the competitive system resulting from these conflicting directorships was the evil aimed at .* * *") (Emphasis added.)

Section 15 of the Shipping Act gives the Commission power to approve only agreements among carriers by water. No matter what findings it made, the Commission could

*This legislation is, of course, aimed at restraints between two competitors which are far less serious than the restraints which could result from the potential cartel between the air and sea conferences.

not exempt from the antitrust laws an agreement between air and sea carriers. As a matter of law, an interlocking directorate coupled with a voting rule that would give a Janus-like principal the potential to stymie majority aspirations in his own economic interests is beyond the jurisdiction of the Commission. See *United States* v. *Far East Conference,* 94 F. Supp. 900-03 (D. N. J. 1951), *rev'd on other grounds,* 342 U. S. 570 (1952).

The Commission did not have to reach this issue, since it had already disapproved the unanimity rule for other reasons. However, the court below should have affirmed on this ground, since as this Court said in *Chenery*: "It would be wasteful to send a case back to a lower court [or agency] to reinstate a decision * * * which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate" (318 U. S. at 88). The issue was fully briefed to the court below, and it should have affirmed the Commission's decision on this ground.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 16, 1967

APPENDIX A

Report and Order of the Federal Maritime Commission dated January 30, 1964.

Petitioner respectfully refers the Court to Appendix A of the Government's Petition, printed at pages 17-65 thereof.

APPENDIX B

Opinion of the Court of Appeals for the District of Columbia Circuit dated June 10, 1965.

Petitioner respectfully refers the Court to Appendix B of the Government's Petition, printed at pages 67-77 thereof.

APPENDIX C

Report and Order of the Federal Maritime Commission on Remand dated July 20, 1966.

Petitioner respectfully refers the Court to Appendix C of the Government's Petition, printed at pages 78-128 thereof.

APPENDIX D

Opinion of the Court of Appeals for the District of Columbia Circuit dated January 19, 1967.

Petitioner respectfully refers the Court to Appendix D of the Government's Petition, printed at pages 129-132 thereof.

APPENDIX E

Judgment of the Court of Appeals for the District of Columbia Circuit entered January 19, 1967.

Petitioner respectfully refers the Court to Appendix E of the Government's Petition, printed at page 133 thereof.